No. 84-240

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

NANCY FREEDMAN, *et al.*,
Petitioners,
v.
TRANS WORLD AIRLINES, INC., and
INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF IN OPPOSITION OF INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS

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STATEMENT OF THE CASE

The Independent Federation of Flight Attendants (IFFA), an intervenor in this litigation and a Respondent herein, today offers the Court the following explanation of the history and posture of this case. Although IFFA is not listed as a respondent on the face of the *Petition for Certiorari*, IFFA has been a party to this litigation since 1979 and participated fully in the proceedings that relate to the issues now presented to the Court.

This case is now more than fourteen years old, and has thus far produced seven opinions from the Court of

Appeals, one Supreme Court opinion,[1] and five petitions for *certiorari*. While we will try to be succinct, it is not possible to understand the issues presented in the Petition without a somewhat detailed chronology of the history of the litigation.

A. Proceedings before this Court's opinion in *Zipes*

Until October of 1970, Respondent Trans World Airlines, Inc. (TWA) maintained a "no-motherhood" policy resulting in the termination of female flight attendants who became mothers. On May 30, 1970, a charge was filed with the Equal Employment Opportunity Commission (EEOC) challenging this practice. This was the first such charge filed. A class-action complaint was filed on August 18, 1970, in the United States District Court for the Northern District of Illinois, alleging that TWA's no-motherhood policy violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* The purported class consisted of all flight attendants terminated on account of motherhood since July 2, 1965 (the effective date of the Act). One of the class representatives was the union then representing TWA's flight attendants, the Air Line Stewards and Stewardesses Association (ALSSA).

TWA and the class representatives reached a tentative settlement in 1971, under which each class member would be allowed to obtain reemployment with TWA. The settlement provided that each class member be credited with the competitive seniority accrued at the time of her termination, but no retroactive seniority for the period between termination and reemployment. Moreover, the settlement provided for *no* payment of any backpay by TWA. The District Court approved the settlement. However, dissident class members appealed and the Seventh Circuit reversed. *ALSSA v. American Airlines, et*

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[1] *Zipes v. TWA, et al.*, 455 U.S. 385, 102 S.Ct. 1127 (1982).

al., 490 F.2d 636 (7th Cir. 1973), *cert. den.*, 416 U.S. 993 (1974).[2] The Court of Appeals said that ALSSA had a conflict between the interests of the class members and the incumbent flight attendants, and directed that ALSSA be removed as a class representative.[3]

After the first settlement was aborted, new class representatives were appointed and the case proceeded on the merits. In 1976 the District Court ruled that TWA's policy was indeed violative of Title VII. However, TWA moved to exclude from the class all women terminated more than ninety (90) days prior to May 30, 1970 (the filing date of the first EEOC charge). This motion was made pursuant to 42 U.S.C. § 2000-e5(d) (1970), which at that time imposed a 90-day time limit for filing a charge pursuant to Title VII. The District Court denied this motion on October 15, 1976, holding that TWA had engaged in a "*continuing violation of plaintiffs' rights which existed until the time the defendant changed the challenged policy.*" This order is contained in the Appendix to this Brief (hereinafter "App.") at p. 1a. Thus the District Court held that the claims of all class members were timely.

The Seventh Circuit, however, reversed in an opinion known as *In re Consolidated Pretrial Proceedings in the Airline Cases*, 582 F.2d 1142 (1978). While agreeing that TWA's policy was illegal, the Court of Appeals found that there was *no continuing violation* and thus the claims of all women terminated more than ninety days prior to the filing of the EEOC charge *were untimely.* The Seventh Circuit held that the time limit began to run from the date of termination, not the date TWA changed

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[2] For a time this suit was consolidated with a similar action against American Airlines.

[3] Thus ALSSA, which is now defunct, has not been a party to this case since 1974. Nonetheless it frequently incorrectly appears on case captions, as exemplified by the Petition herein.

its policy. 582 F.2d at 1149. The court then considered an argument by Plaintiffs that TWA had *waived* its timeliness defense. The Seventh Circuit held that it *need not consider this argument*, because the Title VII time limits were jurisdictional in nature and could not be waived. Specifically, the court stated:

> Although it is questionable whether any concessions made at a settlement hearing should be held to constitute a waiver when the settlement is subsequently overturned, *we need not reach this question* as our conclusion that this filing requirement was jurisdictional *precludes* a finding of waiver. (582 F.2d at 1151) (emphasis supplied).

Plaintiffs then sought *certiorari* (No. 78-1545) *solely* on the issue of whether the Title VII time limits were subject to waiver. They did *not* appeal the Seventh Circuit's decision that there was no continuing violation. TWA cross-petitioned (No. 78-1549), but before the Court acted upon these petitions, Plaintiffs and TWA again reached a tentative settlement. Pursuant to the new settlement the class was divided into two subclasses: Sub-Class A consisted of those class members whose claims were clearly timely (about 8% of the total class), and Sub-Class B consisted of those class members whose claims were found to be untimely by the Seventh Circuit (about 92% of the total class).[4] TWA was required to pay 1.5 million dollars ($1,500,000.00) to each sub-class. Moreover, TWA was to offer reemployment to all class members upon the occurrence of vacancies in the TWA flight attendant system. The District Court was empowered by the settlement to grant to each class member who opted for reemployment retroactive competitive seniority from the date she originally was hired by TWA through and until the date the Settlement Agreement was signed by TWA in June of 1979.

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[4] The Class has been estimated to be 450 women.

At this point IFFA, which had replaced ALSSA as the labor union representing TWA's flight attendants, intervened in the proceedings before the District Court and objected to the settlement and to any grant of retroactive competitive seniority to the Plaintiffs. IFFA's two principal arguments were: (1) since the Seventh Circuit had held that there was no subject matter jurisdiction over the claims of Sub-Class B, the District Court had no jurisdiction to approve a settlement of those claims and grant seniority to those Plaintiffs; and (2) that in any event seniority should not be granted to Sub-Class B because those women had not prevailed on the merits and in fact the Seventh Circuit had ruled that these claims were untimely. The District Court overruled IFFA's arguments, approved the settlement, and granted to Plaintiffs the maximum seniority allowable under the Settlement Agreement. The Seventh Circuit affirmed in an opinion reported at 630 F.2d 1164 (7th Cir. 1980). Both the District Court and the Court of Appeals felt that the District Court had power to approve the settlement and grant seniority to Sub-Class B members regardless of whether the District Court had subject matter jurisdiction over those claims.

IFFA then filed for *certiorari* (No. 80-951), raising the two arguments mentioned above. In March of 1981, the Court granted IFFA's Petition in No. 80-951 and also granted *certiorari* in Nos. 78-1545 and 78-1549 and consolidated the three appeals.

B. The *Zipes* opinion

The opinion of this Court issued on February 24, 1982, *sub nom. Zipes v. Trans World Airlines, Inc., et al.*, 455 U.S. 385, 102 S.Ct. 1127. The Court first took up the issue in No. 78-1545 and held that the Title VII time limits are not jurisdictional in nature and can be subject to waiver and estoppel. The Supreme Court did *not* rule on the issue of whether TWA *had* waived the timeliness

defense, an issue upon which the Court had not been asked to rule and upon which neither of the lower courts had ever ruled.

The Court then turned to IFFA's arguments in No. 80-951. The issue of whether a court had jurisdiction to approve a settlement when it lacked jurisdiction over the merits was obviously mooted by the Court's prior decision that there was in fact no jurisdictional barrier. The Court then took up IFFA's second issue, that Sub-Class B members could not be granted seniority at the expense of the incumbent flight attendants because Sub-Class B members had not prevailed on the merits and in fact their claims had been held untimely by the Seventh Circuit. The Court gave this issue short shrift, stating:

> With the reversal of the Court of Appeals judgment in No. 78-1545 and our dismissal of No. 78-1549, which had challenged the affirmance of the summary judgment order, the order that found class-wide discrimination remains intact and is final. The award of retroactive seniority to members of Subclass B as well as Subclass A is not infirm for want of a finding of a discriminatory employment practice. 455 U.S. at 399, 102 S.Ct. at 1135.

This statement by the Court is, however, *incorrect.* As demonstrated above, the District Court's grant of summary judgment had been premised upon a finding that TWA had engaged in a *continuing violation,* thus making the claims of Sub-Class B timely and valid. The Seventh Circuit, however, had found that there was *no continuing violation* and that Sub-Class B claims were untimely, a holding *undisturbed* by the Supreme Court's ruling in *Zipes.* Thus, the summary judgment granted by the District Court *did not* remain intact but remains reversed as to Sub-Class B because there was no continuing violation, subject only to further proceedings in which Plaintiffs might be allowed to advance their argument that TWA had waived the timeliness defense.

C. Proceedings subsequent to the *Zipes* opinion

Shortly after the issuance of this Court's opinion in *Zipes*, a dispute arose between Plaintiffs and TWA regarding the date of reemployment of Plaintiffs. TWA contended that it was not obligated to employ Plaintiffs unless and until it had "vacancies" in its flight attendant work force, and noted that it had had no vacancies since the Settlement Agreement had been signed in June of 1979. Plaintiffs contended that TWA was obligated to employ them within a year of the Supreme Court's order finally approving the settlement, regardless of whether "vacancies" existed. The District Court ruled in favor of the Plaintiffs, but the Seventh Circuit reversed, holding that TWA did not have to employ Plaintiffs unless and until TWA deemed that "vacancies" existed. See Case Nos. 82-2929 and 82-2933, App. 5a, decided August 1, 1983.

In May of 1983, vacancies began to arise at TWA and all Plaintiffs who had opted for reemployment were allowed to commence employment over a period of several months. It is believed that the actual number of Plaintiffs who returned is 207. This number is greater than the estimates given to the District Court at the time the settlement was approved and seniority was granted to Plaintiffs along with a finding that such seniority would have no unusual adverse impact upon incumbents.[5]

It was at this point that Plaintiffs filed the motion at issue in their current Petition. Plaintiffs asked the District Court to grant to all Plaintiffs who returned to TWA additional competitive seniority *beyond* that allowed by the Settlement Agreement. As mentioned ear-

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[5] While it is true as Plaintiffs point out that some members who chose reemployment later decided against it, a greater number of new class members surfaced who were allowed to elect reemployment subsequent to the November, 1979 approval of the settlement agreement by the District Court.

lier, the Settlement Agreement limited any grant of seniority to the "Compensation Period", which the Agreement defines as each Plaintiff's original date of hire by TWA through the date TWA signed the Settlement Agreement in June of 1979. Plaintiffs now sought seniority for the period between the date of the signing of the Settlement Agreement in 1979 and the date each Plaintiff returned to TWA sometime during 1983. Plaintiffs also asked that any class members who had elected not to seek reemployment with TWA (such election being made on sworn claim forms proffered by each class member during the proceedings that led to the approval of the Settlement Agreement by the District Court in 1979) now be allowed to change their minds and become TWA flight attendants.

The District Court denied both requests on April 23, 1983 (Appendix to Plaintiffs' Petition, p. 20a, hereinafter "Pet. App."). Judge Roszkowski felt that Plaintiffs were bound by their own Settlement Agreement, which limited any grant of seniority to June of 1979 and also specifically required that the reemployment option be exercised no later than December 2, 1979. The Seventh Circuit affirmed on March 27, 1984 (Pet. App. 1a). Regarding Plaintiffs' arguments that "changed circumstances" required a grant of additional seniority the Court of Appeals stated that the "[C]hange of circumstance was neither unforeseeable nor so exceptional as to satisfy the standard for modification . . .". (Pet. App. at 11a). Similarly, the claim to allow some Plaintiffs to change their minds and opt for reemployment now was rejected not only due to the specific terms of the Settlement Agreement but also because the courts had relied on the number of returning Plaintiffs asserted in 1979 in determining that the seniority granted would not have any "unusual adverse impact" upon incumbents (Pet. App. at 14a).

Finally, the seniority granted by the District Court in 1979 and subsequently affirmed by the appellate courts was premised in large part on the assertions made by Plaintiffs and TWA that the seniority granted to Plaintiffs would not cost any incumbent flight attendants their jobs. See, for example, the Seventh Circuit's 1980 opinion, where the court said:

> Testimony indicated that providing positions for these reinstated attendants would normally be possible as a result of normal attrition of workers in less than half a year. The agreement provided that no currently employed attendant would be required to lose employment in order to accommodate a reinstated attendant. 630 F.2d 1164, at 1169.

In fact, it has not happened that way. TWA has been in a continuous furlough situation since 1979, and has not hired a single flight attendant since before the Settlement Agreement was signed in June of 1979. Hundreds of flight attendants who had jobs prior to the settlement are currently furloughed. And for each Plaintiff who has returned to TWA, an incumbent flight attendant is currently on involuntary furlough *due to the seniority granted Plaintiffs* pursuant to the settlement.

ARGUMENT

I. Plaintiffs Are Not Victors On The Merits And Are Bound By Their Settlement

The first question presented in the Petition is based entirely upon Plaintiffs' claim that pursuant to this Court's opinion in *Zipes*, Plaintiffs are to be treated not as parties who settled but as having obtained full victory on the merits of their claims. This claim springs from the language in the *Zipes* opinion (which we would like to call *dicta*) indicating that as a result of *Zipes*, the District Court's summary judgment was completely reinstated. However, as indicated in our Statement of the

Case, that summary judgment *could not* have been reinstated, since the *Zipes* opinion left undisturbed the Seventh Circuit's reversal of the District Court's finding that TWA had engaged in a continuing violation.

Counsel herein does not take lightly the task of explaining to the Supreme Court of the United States that it misstated the record in a case before it. Nonetheless, that record is clear and unambiguous and the Court's misstatement is obviously central to the issues raised today. Moreover, the Seventh Circuit recognized this very point in the opinion which Plaintiffs now seek to have overturned, stating:

> [T]he Supreme Court's holding in *Zipes* does not entirely settle the issue of the validity of the claims of Subclass B members, the district court's observation concerning TWA's possible waiver of this defense indicates that *perhaps* none of the claims of any class members was barred. (Pet. App. at 6a, n.5, emphasis supplied).

The Seventh Circuit is correct. If it were determined that TWA had somehow waived its right to assert its defense that the claims of Sub-Class B were untimely (and that IFFA was bound by TWA's waiver), then none of the Plaintiffs' claims would be barred. If, however, TWA had not committed any such waiver, then the claims of 92% of the Plaintiffs would simply be dismissed.[7]

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[7] In addition, statements by the Court itself in Part I of the *Zipes* opinion demonstrate this point:

> While the District Court agreed that the filing requirements of Title VII are jurisdictional, it denied the motion on the basis that any violation by the airline *continued* against all the class members until the airline changed the challenged policy.
>
> . . . (The Court of Appeals) *declined*, however, "to *extend the continuing violation* theory, as did the district court, so as to include in the plaintiff class those employees who were perma-

In addition, the Plaintiffs' actions belie their arguments. If Plaintiffs truly believed they were final victors on the merits they would be seeking not just seniority but also many millions of dollars. The total backpay liability for all Plaintiffs would certainly be more than a dozen times the amount paid pursuant to the settlement. For example, the average Sub-Class B member received (after deduction for attorneys' fees) less than $2,000 each as compensation for 13-18 years of backpay. The fact that Plaintiffs have never sought more money from TWA since *Zipes* shows that they are hardly serious about their claim to be victors and not settlors.

Why Plaintiffs believe their cause is helped by *Firefighters Local Union No. 1784 v. Stotts*, —— U.S. ——, 104 S.Ct. 2576 (1984), or *Romasanta v. United Air Lines, Inc.*, 717 F.2d 1140 (7th Cir. 1983), is a mystery. In *Stotts*, this Court refused to allow a District Court to modify a consent decree by ordering layoffs of non-minority employees to protect the jobs of minority employes with less seniority hired pursuant to the consent decree. Here, settling Plaintiffs were granted enough seniority to force incumbent employes to be on furlough. In *Romasanta*, the plaintiffs *did not settle, but prevailed after full litigation* of their claims. Nonetheless, the district court only granted to plaintiffs the seniority held at the time of their termination, due to the recessionary/layoff situation at United and the impact full seniority

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nently terminated more than 90 days before the filing of EEOC charges"....

The Court of Appeals went on to hold that timely filing of EEOC charges was a jurisdictional prerequisite. (455 U.S. at 389, 102 S.Ct. at 1130, emphasis supplied).

See also the concurring opinion of Justice Powell which states "[I]n view of (this case's) complexity it is difficult to be certain as to what happened and when." 455 U.S. at 402, 102 S.Ct. at 1137. Statements by counsel for Plaintiffs and TWA in their briefs in *Zipes* and at oral argument also clearly demonstrate that no court has ever ruled that TWA waived its timeliness defense.

would have upon incumbents. The difference between *Romasanta* and this litigation is that at the time the *United* plaintiffs sought seniority the recession in the airline industry was in full bloom, whereas at the time the Settlement Agreement here was approved that recession had not yet begun. If anything, *Stotts* and *Romasanta* indicate Plaintiffs should have received *less* seniority, not more.

II. The New Conditions Of Which Plaintiffs Complain Were Entirely Foreseeable And Have Harmed Incumbents Far More Than Plaintiffs

The "changed circumstances" of which Plaintiffs complain is the fact that they were not reemployed by TWA until 1983 due to the fact that TWA had no vacancies before then. Instead of acknowledging that they misled the District Court and that because of the seniority granted previously 207 incumbents are currently on furlough, Plaintiffs ask for four more years of seniority. But as the Seventh Circuit indicated, the delay in Plaintiffs' return was entirely foreseeable. Substantial delay in reemployment was clearly anticipated by the Settlement Agreement Plaintiffs negotiated, which said that Plaintiffs would not be reemployed until TWA had vacancies. Moreover, due to the great amounts of seniority already granted to Plaintiffs, they are not in any danger of losing their jobs. Thus, the lower courts properly rejected Plaintiffs' request for more seniority due to changed circumstances.[8]

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[8] Any claim by Plaintiffs that IFFA is to blame for the delay in their reemployment is frivolous in light of the Seventh Circuit's decision (in Case No. 82-2929, App. at 5a) that TWA did not have to hire Plaintiffs until vacancies existed, since none did between 1979 and 1983. In any event, the litigation over the seniority issue was clearly anticipated by the Settlement Agreement.

III. The Claim Forms, Settlement Agreement, And Class Notice Are Not Ambiguous

No conflict exists between *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950), because it is perfectly obvious that all class members knew what they were doing when they elected or did not elect to seek reemployment in 1979. The Notice to Class Members states that "[T]o be eligible for reemployment" class members must "[C]omplete the enclosed Claim Form. . ." (Pet. App. at 35a). The claim form itself specifically asked "Do you desire reemployment as a TWA hostess?" (Pet. App. at 25a) and each class member filled out her form under oath. Moreover, the Settlement Agreement itself clearly requires claim forms to have been filed in 1979. It hardly seems necessary to mention that the Settlement Agreement and Notice were drafted by Plaintiffs' counsel who now seek to find and take advantage of their own ambiguity. Obviously each class member understood what choice she was making when she executed her claim form, and there is no issue worthy of review by this Court.

IV. Plaintiffs' Fourth Issue Is Without Merit

The Notice to Class Members (Pet. App. at 32a) informed Plaintiffs that the District Court would be empowered to grant them seniority and that "[P]laintiffs intend to seek full retroactive seniority for the entire period up to June 18, 1979." (Pet. App. at 36a). Such seniority was in fact granted. Since Plaintiffs received the maximum seniority available, we fail to understand of what Plaintiffs complain in their fourth Question Presented. Given the fact that no Plaintiffs opted out of the settlement when they did not know how much seniority would be granted, it is difficult to understand why any of the Plaintiffs would have wanted to opt out had they known that the maximum seniority possible would have been granted. Further, we note (1) that the settlement

proceedings were structured in the manner Plaintiffs' counsel desired; (2) any complaints regarding the sufficiency of the 1979 proceeding should have been appealed in 1979; and (3) the thrust of Plaintiffs' argument seems intended to vitiate the settlement they have fought so long to uphold.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Master File No. 70 C 2071

This document relates to:

No. 70 C 2069
No. 70 C 2071
No. 72 C 498
No. 74 C 2063
No. 74 C 2762

IN RE CONSOLIDATED PRETRIAL PROCEEDINGS
IN THE AIRLINE CASES

MEMORANDUM OPINION AND ORDER

On November 18, 1974, The Honorable Richard J. McLaren issued a memorandum opinion and order allowing defendants Trans World Airlines, Inc. and American Airlines, Inc. to amend their answers to include the "affirmative defense" of the statute of limitations contained in 42 U.S.C. § 2000e-5e. This statute imposed a ninety-day period after an alleged unlawful practice within which a charge could be filed with the Equal Employment Opportunity Commission. Judge McLaren noted and left open the question of whether defendants' delay in pleading the defense of limitations constituted a waiver of the defense.

Defendants are now moving to exclude certain persons of plaintiffs' class for lack of subject matter jurisdiction, urging that Title VII's time limits are not a matter of defense but are, rather, jurisdictional prerequisites not

subject to waiver by the actions of the defendants. Factually, they are seeking to exclude all persons whose employment was terminated on the grounds of pregnancy more than ninety days prior to May 31, 1970, the date of filing by the original plaintiff-union, Air Line Stewards and Stewardesses Association, Local 550.

Several courts have recently considered the question of whether Title VII's time limits are in the nature of statutes of limitations or jurisdictional prerequisities, and have concluded the former. *Reeb* v. *Economic Opportunity Atlanta, Inc.*, 516 F.2d 924 (5th Cir. 1975); *Dartt* v. *Shell Oil Co.*, —— F. 2d ——, 13 FEP Cases 12 (10th Cir. 7/22/76); 408 F. Supp. 229 (D. Conn. 1976).

The Seventh Circuit, however, has characterized the issue as jurisdictional. *Choate* v. *Caterpillar Co.*, 402 F. 2d 357 (7th Cir. 1968); *see* also *Evans* v. *United Air Lines, Inc.*, 534 F. 2d 1247 (7th Cir. 1976); *McGuire* v. *Aluminum Company of America*, —— F. 2d ——, No. 76-1013 (7th Cir. 9/9/76). This court is persuaded that the Seventh Circuit holding is correct and that the time requirements of Title VII are jurisdictional in nature.[1]

Having so decided, the next question for resolution is whether the claims of certain class members are time-barred. Defendants' motion is grounded upon the assumption that the violation occurred at the moment of termination due to pregnancy and, therefore, the ninety days began to run for each class member at that moment. Plaintiffs, on the other hand, assert the existence of a "continuing violation" which existed at least until the airlines abandoned their policy of refusing to rehire mothers.

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[1] Plaintiffs urge that this court should estop the defendants from raising the jurisdictional question. E.g., *DiFrischia* v. *New York Central Railroad*, 279 F.2d 141 (3rd Cir. 1960). Because of the view we takes of this case, we need not reach this extraordinary estoppel question.

We agree with the plaintiffs' view of this action. If this case sought only to challenge the policy of firing pregnant stewardesses, we would agree that the ninety-day limit began to run the moment of termination. But, as noted in our memorandum opinion and order dated April 28, 1976, this case challenges a policy much more broad than that. It challenges the "no motherhood" policy which begins at pregnancy, yet continues to prevent the re-hiring of the alleged class members once pregnancy is at an end. Thus, we find a continuing violation of plaintiffs' rights which existed until the time that defendants changed the challenged policy.[2] *See, Boudreaux* v. *Baton Rouge Marine Contracting Co.*, 437 F. 2d 1011 (5th Cir. 1971); *Macklin* v. *Spector Freight Systems, Inc.*, 478 F. 2d 979 (D.C. Cir. 1973). Because of the essential difference between the parties as to the nature of the violation here, and the court's agreement with the plaintiffs' position, defendants' authorities do not compel a different result.[3]

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[2] We note further, although we do not base our holding today thereon, plaintiffs' allegations that the effects of the discriminatory policy continued past that date as to all stewardesses who are not rehired pending the outcome of this case because they failed to waive their claims to back-pay. The allegation with respect to back-pay appears to be within the scope of *Evans* v. *United Airlines, Inc., supra.* Perpetuation of a disadvantage suffered because of a past discrimination is itself a violation thereunder.

[3] We have considered, too, the Memorandum of Movants for Intervention in Reply to Plaintiffs' Memorandum in Response to Defendants' Motion to Exclude Certain Persons From the Class. The memorandum is directed basically towards a final remedy in this case and against various allegations made by plaintiffs with respect to this predecessor union's good faith. That memorandum does not call for a different result within the context of this motion.

For the foregoing reasons, defendants' motion to exclude certain persons from the class for lack of subject matter jurisdiction is hereby denied.

/s/ Frank J. McGarr
United States District Judge

Dated: October 15, 1976

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 82-2929

AIR LINE STEWARDS AND STEWARDESSES ASSOC., Local 550, TWU, AFL-CIO, *et al.*,
Plaintiffs-Appellees,

v.

TRANS WORLD AIRLINES, INC.,
Defendant-Appellant.

No. 82-2933

ANNE B. ZIPES, *et al.*,
Plaintiffs-Appellees,

v.

TRANS WORLD AIRLINES, INC.,
Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 70 C 2071 and 70 C 2063—Stanley J. Roszkowski, Judge.

ARGUED APRIL 7, 1983—DECIDED AUGUST 1, 1983

Before CUMMINGS, *Chief Judge*, COFFEY, *Circuit Judge*, and WEIGEL, *Senior District Judge.**

COFFEY, *Circuit Judge*. The defendant, Trans World Airlines (TWA) appeals from the district court's decision that under the terms of a Settlement Agreement entered into between TWA and a class of former flight attendants, TWA is required to re-employ the former female flight attendants immediately upon the completion of certain retraining classes regardless of whether or not TWA has any present vacancies in its work force. The defendant, on the other hand, contends that the Settlement Agreement requires TWA to re-employ the flight attendants after they have completed retraining but only at such time as a vacancy exists. Reversed.

I.

The complaint in this litigation was filed on August 8, 1970, alleging that between 1965 and 1970 the defendant TWA maintained a policy of terminating female flight attendants who became pregnant, and that such action was in violation of their rights under Title VII of the Civil Rights Act of 1964. After numerous pretrial motions and appeals from the disposition of these motions [1] the parties arrived at a Settlement Agreement, contingent upon approval by the district court pursuant to Fed. R. Civ. P. 26(e). The district court approved the settlement over the objection of the union representing current TWA personnel who might have been affected by the settlement (Independent Federation of Flight Attendants). The union objected to the settlement, contending that the Settlement Agreement would adversely affect

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* The Honorable Stanley A. Weigel, Senior District Judge of the Northern District of California, is sitting by designation.

[1] For an in-depth examination of the procedural history of the instant case *see Air Lines Stewards, Etc. v. Trans World Airlines, Inc.*, 630 F.2d 1164, 1165-66 (7th Cir. 1980).

current TWA flight attendants. The district court disagreed on the grounds that granting retroactive seniority to the returning class members would not adversely affect TWA's present employees as no currently employed flight attendant would be fired in order that one of the class members could be reinstated, and this decision was affirmed by this court, *Air Line Stewards, Etc. v. Trans World Airlines, Inc.*, 630 F.2d 1164 (7th Cir. 1980), and ultimately by the Supreme Court, *Zipes, et al. v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982).

In October of 1982 the plaintiffs filed a motion with the district court requesting an order that the Settlement Agreement be interpreted as entitling all class members to immediate re-employment by TWA upon the successful completion of their retraining classes. In addition to this declaratory relief, the plaintiffs also sought a permanent injunction compelling TWA to commence paying wages to all re-employed class members immediately upon completion of the retraining classes regardless of whether or not TWA had positions for the retrained flight attendants. The district court granted the plaintiffs' motion for declaratory relief on the grounds that "the settlement agreement, when read as a whole and considered in light of its fundamental purpose, does require that TWA re-employ the class members" and that TWA "is obligated to provide employment no later than the end of the last retraining class . . . ." The defendant has appealed from the district court's decision.

II.

Our resolution of the instant dispute hinges upon the construction of two sections of the Settlement Agreement. Section VI of the Settlement Agreement is entitled "Eligibility for Re-Employment" and provides as follows:

> "TWA agrees to offer: (1) flight attendant retraining to all class members and (2) re-employment as flight attendants to those class members who

satisfactorily complete such retraining. TWA will provide retraining classes, the last of which shall commence prior to the expiration of one (1) year following the Final Order Date. TWA will have no obligation to retrain or re-employ any class member following the end of such one (1) year period if such class member has either not qualified for such retraining or re-employment, has elected not to participate in such retraining or has elected not to accept such re-employment during such one (1) year period."

Section IX, entitled "Re-Employment Procedures," states:

"For the purpose of retraining applicants for re-employment, TWA will conduct retraining classes. TWA will notify each applicant for re-employment (in writing, giving at least thirty (30) days' advance notice) of the commencement date of the retraining class which she is to attend.

* * * *

Each class member who successfully completes retraining will be permitted to select assignment to a flight attendant base (or bases) of her choice, at which a vacancy exists, provided that no flight attendant having greater seniority desires to fill such a vacancy. If a class member is unable to obtain a base assignment which she desires, she will be assigned to fill a vacancy at any base selected by TWA."

The district court, in interpreting the Settlement Agreement, noted that in Section VI "TWA agrees to offer . . . re-employment as flight attendants to those class members who satisfactorily complete such retraining," and that section IX of the Agreement grants the class members a "right to re-employment." Reading these two sections together, the district court concluded that "these terms unambiguously evidence the parties

intent that TWA undertake an affirmative obligation to re-employ class members," and while section IX makes a class member's assignment to a base contingent upon a "vacancy," this section "has no effect whatsoever on the obligation to rehire." Finally, the district court declined to adopt TWA's position that it should not be required to rehire a flight attendant until a vacancy exists because "if TWA were permitted by the settlement agreement to indefinitely delay the re-employment of the class members, there would have been no reason to fix the definite time limit of April 19, 1982 from which training classes had to begin."

III.

A settlement agreement is a contract and as such, "the construction and enforcement of settlement agreements are governed by principles of local law applicable to contracts generally." *Florida Educational Assoc. v. Atkinson*, 481 F.2d 662, 663 (5th Cir. 1973). When interpreting a contract under Illinois law, "[t]he intent of the parties to a contract must be determined with reference to the contract as a whole, not merely by reference to particular words or isolated phrases, but by reviewing each part in light of the others." *LaThrop v. Bell Federal Savings & Loan Assoc.*, 68 Ill. 2d 375, 378, 370 N.E.2d 188, 191 (1977). The language of a settlement agreement must be construed literally in a straightforward manner, and courts must give full force and effect to each and every provision contained in these court-approved agreements. *Robin v. Sun Oil Co.*, 548 F.2d 554, 557 (5th Cir. 1977). Thus, in interpreting the Settlement Agreement between the plaintiffs and TWA, under well-settled rules of contract interpretation, this court must give effect to each and every section of the Agreement, and must read the different sections harmoniously, and accord each section its proper weight, and not read the sections out of context to achieve a desired result as the plaintiffs request.

Section VI, entitled "Eligibility for Re-Employment," is a separate and distinct section of the Settlement Agreement and establishes TWA's obligation to offer retraining to members of the plaintiffs' class and to offer re-employment only to those plaintiffs who satisfactorily complete the flight attendant retraining classes. While it is true that section VI requires TWA to offer retraining within one year following the effective date of the final order, section VI contains no reference to or language establishing a time frame within which TWA must offer the plaintiffs re-employment. Section VI merely obligates TWA to provide the opportunity for re-employment to a certain class of former flight attendants who successfully complete the retraining classes TWA is required to provide. Labeled "Eligibility for Re-Employment," section VI sets forth the conditions under which TWA will offer re-employment to the plaintiffs and there is no language in section VI that explains, defines or even refers to the plaintiffs' right to re-employment once they have become "eligible for re-employment." Thus, we must examine the other language in the contract referring to the time frame and/or the date of re-employment.

Section IX of the Settlement Agreement, on the other hand, is entitled "Re-Employment Procedures." This section states that upon the successful completion of retraining, class members "will be permitted to select assignment to a flight attendant base (or bases) of her choice at which a vacancy exists, provided that no flight attendant having greater seniority desires to fill such a vacancy." Section IX thus sets forth the circumstances under which class members must be re-employed once they have met the eligibility for re-employment set forth in section VI. While section VI conditions the *eligibility* for employment upon the successful completion of flight attendant retraining classes, the language in section IX conditions a plaintiffs' *right* to re-employment upon successful completion of the retraining class *and* upon the

existence of a vacancy at a flight attendant base. As we have stated earlier, the language of sections VI and IX is clear and unambiguous, and must be read harmoniously in order that we might give the proper effect to the plain meaning of the Agreement. *Hanley v. James McHugh Construction Co.*, 444 F.2d 1006 (7th Cir. 1971), and we must read the contract as a whole, and not bifurcate it to reach a desired result. *LaThrop*, 68 Ill. 2d at 381, 370 N.E.2d at 191. We hold that the plain and unambiguous language of the Settlement Agreement, when construed as a whole, requires TWA to offer training classes to members of the plaintiffs' class within one year following the final order date, and further, TWA must offer employment to those class members who successfully complete these retraining classes within the given time frame but ony at such time as a vacancy exists at a flight attendant base.[2]

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[2] The dissent takes the position that the contract is ambiguous with regard to "when those eligible must be rehired," and therefore calls for a remand to consider extrinsic evidence in an attempt to resolve this question. Since we hold the contract is unambiguous the principle of contract construction favoring the reliability of written instruments warrants the exclusion of any such extrinsic evidence. As we recently stated in *Binks Manufacturing Co. v. National Presto Industries, Inc.*, No. 82-1609, slip op. (7th Cir. May 20, 1983):

> "The policy of upholding the integrity of written contracts and favoring written terms over extrinsic evidence is particularly relevant in cases of this nature involving a written contract between two large corporations presumably represented by competent counsel."

Id. at 12-13. Although *Binks* involved the interpretation of Ill. Rev. Stat. ch. 26, § 2-202 (UCC § 2-202) concerning extrinsic evidence, the general policy of "upholding the integrity of written contracts" appears to apply equally as well to the present agreement between a labor association and a corporation which were both represented by competent counsel. That policy mitigates against a remand for a consideration of extrinsic evidence as it mitigated against the consideration of such evidence in *Binks*.

Our decision that the proper interpretation of the Settlement Agreement requires TWA to rehire the plaintiffs only at such time as a vacancy exists at a flight attendant base is supported by this Court's prior approval of the Settlement Agreement in *Air Lines Stewards, Etc. v. Trans World Airlines, Inc.*, 630 F.2d 1164 (7th Cir. 1980). When the union appealed from the district court's approval of the Settlement Agreement, the union argued that the provisions of the Settlement Agreement granting the plaintiffs retroactive seniority would have an "adverse impact" on TWA's current flight attendants. It was the union's position that the Settlement Agreement would adversely affect current employees because if returning class members were granted retroactive seniority they would be able to displace currently employed flight attendants. This court rejected the union's position and interpreted the Agreement as providing that no currently employed flight attendant would be required to lose employment and further held that "providing positions for these reinstated attendants would normally be possible as a result of normal attrition of workers . . . ." 630 F.2d at 1169. It implicitly follows that when a vacancy was created by "normal attrition," those flight attendants who had successfully completed retraining would be offered a position at the flight attendant base or bases where the vacancy existed.

The plaintiffs now contend that TWA is required by the Settlement Agreement to rehire members of the plaintiffs' class without regard to whether vacancies exist and without regard to the rights of current employees. However, we will not permit the plaintiffs to argue in one appeal to this court that the Settlement Agreement does not have an adverse impact on current employees because no employee will be displaced by a returning class member and now assert that the Agreement requires TWA to hire returning class members even though no vacancies exist. If we were to adopt the plaintiffs' argument, TWA

would either have to discharge current flight attendants to make room for returning class members or pay the returning class members their salaries even though there was no work for them to perform. Such an interpretation would defeat the intent of the earlier decision of this court that returning flight attendants would be hired to fill vacancies created by "normal attrition." The plaintiffs' suggested interpretation of the Settlement Agreement is not based on sound financial policy, finds no support in the language of the Agreement itself, and ignores the economic impact this interpretation would have on TWA. Courts not only have the obligation to operate within the law, but must also continue to be aware of economic reality and show fiscal responsibility in their decisions and we will not participate in dragging TWA into financial stress. As we interpret the plain and unambiguous meaning of the Settlement Agreement, we can find absolutely no language requiring, and we decline to order TWA to pay returning flight attendants their full salaries if TWA does not have a vacancy at a flight attendant base at the particular time the returning attendants complete the retraining classes.

The district court agreed with the plaintiffs' argument that the offer of re-employment was conditioned only upon the successful completion of retraining classes and that TWA was required to offer the plaintiffs reemployment regardless of whether or not TWA currently had vacancies at any flight attendant base. This argument ignores financial reality in that such a reading of the Settlement Agreement would require TWA to pay the plaintiffs their salaries even if the plaintiffs were not serving in the air as flight attendants. There was no language in the Settlement Agreement requiring TWA to accept this "featherbedding" approach advocated by the plaintiffs.

We hold that the clear and unambiguous language of the Settlement Agreement requires TWA to offer retrain-

ing to members of the plaintiffs' class within one year from the entry of the final order and further to offer re-employment to those plaintiffs who successfully complete the retraining classes at such time as a vacancy exists at a flight attendant base, and therefore, we reverse the district court's decision granting the plaintiffs' motion to compel TWA to rehire the plaintiffs at the completion of their retraining classes without regard to whether current vacancies exist.

WEIGEL, J., dissenting.

I respectfully dissent. I agree that the contract requires satisfactory completion of retraining as a condition precedent to the right to reemployment. But I do not agree (as the majority of the panel does) that the contract is unambiguous in limiting the obligation to rehire to "such time as a vacancy exists at a flight attendant base". Nor do I agree (as the District Court concluded) that the contract is unambiguous in requiring rehiring "no later than the end of the last retraining class".

I deem the contract so ambiguous and imprecise in designating the time when those eligible must be rehired as to call for extrinsic evidence to aid in resolving the question. *See DeGraff v. Kaplan*, 109 Ill. App.3d 711, 440 N.E.2d 930, 933 (1982); and *Pioneer Trust and Savings Bank v. Lucky Stores, Inc.*, 91 Ill. App.3d 573, 414 N.E.2d 1152, 1154 (1980).

Accordingly, I would remand to the trial court for its prompt consideration of such extrinsic evidence. But if it be concluded that the law does not require the taking of such evidence, I would affirm for the reasons stated by the District Court in the order entered October 5, 1982. That is to say this: Absent extrinsic evidence clarifying the time for rehiring, I deem the basic purpose of the contract to call for rehiring consistently with the order of the District Court and would, therefore, affirm.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit